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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SELF-INSUREDS' SECURITY FUND,

Plaintiff,

No. C 06-02828 JSW

v.

GALLAGHER BASSETT SERVICES,

Defendant.

**NOTICE OF TENTATIVE
RULING AND QUESTIONS FOR
HEARING**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE
NOTICE OF THE FOLLOWING TENTATIVE RULING AND QUESTIONS FOR THE
HEARING SCHEDULED ON AUGUST 24, 2007, AT 9:00 A.M.:

The Court has reviewed the parties' memoranda of points and authorities and, thus, does not wish to hear the parties reargue matters addressed in those pleadings. If the parties intend to rely on legal authorities not cited in their briefs, they are ORDERED to notify the Court and opposing counsel of these authorities reasonably in advance of the hearing and to make copies available at the hearing. If the parties submit such additional authorities, they are ORDERED to submit the citations to the authorities only, without argument or additional briefing. *Cf. N.D. Civil Local Rule 7-3(d).* The parties will be given the opportunity at oral argument to explain their reliance on such authority.

The Court **tentatively DENIES Plaintiff's motion.** The Court **tentatively DENIES** Defendant's motion. Each party shall have fifteen (15) minutes to address the following questions:

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1. It appears that Exhibit E to the Declaration of Jennifer Lynch in Support of
2. Gallagher's Motion for Summary Judgment may contain personal information.
3. Does Gallagher intend to file a motion to seal that exhibit or to submit a redacted
4. version of it?
2. Gallagher objects to and moves to strike the Barbagallo Report.
 5. a. What is the Fund's response to Mr. Barbagallo's testimony that neither
6. he nor his team members had any experience with 8 Cal. Regs. § 15300
7. prior to his engagement on this case? (See Declaration of Elizabeth
8. Kennedy in Support of Reply ("Kennedy Reply Decl."), Ex. A
9. (Barbagallo Depo. at 73:4-74:7.)
 - b. Does Mr. Barbagallo have experience with setting reserves for insurance
10. claims in general? If so, how would Gallagher argue that such
11. experience differs materially from setting reserves in workers'
12. compensation cases?
 - c. Gallagher objects to a lack of documentation to support Mr. Barbagallo's
13. opinions. Is Gallagher referring to the Exhibit referenced in the report, or
14. is it referring to the underlying Gallagher documents that Mr. Barbagallo
15. used to set forth his opinions?
 - d. If the latter, is Gallagher truly objecting to the lack of receiving its own
16. documentation or, is its objection based upon the fact that the Fund
17. should have submitted those documents to the Court?
3. The expert reports offer competing conclusions on the issue of negligence.
18. Those conclusions are based in part on the fact that the parties differ in their
19. opinion of whether the ultimate issue of negligence should be evaluated on a
20. "claim-by-claim" basis or upon the "total accrued liability."
 - a. Setting aside the Fund's arguments on reply regarding statutory
21. construction and the deference to be afforded an agency's interpretation
22. of its regulations, does either party have any case law that addresses this
23. particular issue or is this a case of first impression?
 - b. How does Gallagher respond to the Fund's argument on reply that the
24. "total accrued liability" simply is the sum of other amounts to be reported
25. to the SIP, including each individual claim's estimated future liability?
 - c. What evidence is in the record to support the Fund's argument as to how
26. "total accrued liability" is calculated?
 - d. Does Gallagher dispute the fact that it erred in calculating individual
27. claims? If so, where in the record can the Court find evidence to
28. contradict the Fund's expert on that point?
4. In its reply, the Fund posits that if Gallagher underestimated one indemnity
claim, that fact might give rise to a finding of negligence but that it would not
warrant a lawsuit. (See Fund Reply at 8 (noting that "whether a *di minimis*
violation" of duty of care would be grounds for lawsuit is not at issue in this
case). It appears to the Court that the Fund is arguing for strict liability.
Furthermore, notwithstanding the *di minimis* argument, the Fund heavily relies
on the percentages of claims that allegedly were calculated incorrectly to support
its argument that Gallagher was negligent.

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1 California courts have stated that, with respect to setting insurance related
 2 reserves, “it is a task that requires the exercise of judgment and is not an exact
 3 science. Insurers have discretion in setting reserves, and there is an acceptable
 4 range of reserves a carrier could set without incurring liability. ‘[A] particular
 5 reserve amount may be substantially more or less than the amount ultimately
 6 paid on a particular claim.’” *Lance Camper Mfg. Co. v. Republic Indemnity Co.*,
 7 90 Cal. App. 4th 1151, 1155 (2001) (quoting *MacGregor Yacht Corp. v. State*
 8 *Comp. Ins. Fund*, 63 Cal. App. 4th 448, 457 (1998)).

9 Where in the record can the Court find support for the proposition that these
 10 percentages are statistically significant or otherwise violate an industry standard
 11 of care? The Fund’s expert seems to rely solely on his own opinion of what
 12 would constitute an unacceptable percentage of underestimations. (See
 13 Declaration of Elizabeth Kennedy, Ex. A (Barbagallo Depo. at 71:19-72:1.)

14

15 5. The Fund also relies on a *res ipsa loquitur* theory of negligence. (Mot. at 17.)

16 a. Given the case law cited in question 4, would the Fund concede that it
 17 would be possible to underestimate a reserve without doing so in a
 18 negligent fashion?

19 b. If the Fund concedes that the answer to question 5.a. is yes, how can the
 20 doctrine of *res ipsa loquitur* apply? See, e.g., *Brown v. Power Unified*
 21 *School Dist.*, 4 Cal. 4th 820, 825 (1993) (noting, in part, that for
 22 presumption of *res ipsa loquitur* to apply, accident or injury “must be of
 23 a kind which ordinarily does not occur in the absence of someone’s
 24 negligence”).

25 c. Does the Fund have any case law to suggest that the doctrine of *res ipsa*
 26 *loquitur* applies in this type of factual situation, i.e. where some degree of
 27 judgment must be applied?

28 6. The Fund appears to premise its negligence argument in part on the fact that
 29 Gallagher uses the MIRA program to estimate future liabilities. The deposition
 30 testimony submitted by Gallagher suggests that MIRA was used as a tool but
 31 was not used by Gallagher to create quotes for future liabilities and that
 32 Gallagher set reserves *higher* than the MIRA estimate.

33 a. Why does that fact not create a genuine issue of material fact on
 34 Gallagher’s reserving practices and whether they fell within an
 35 appropriate standard of care?

36 b. Does the Fund have any evidence that a tool like MIRA should not be
 37 used in the estimation process?

38 c. Where in the record can the Court find evidence of the type of procedures
 39 or practices a reasonably prudent claims administrator would use to
 40 estimate future liabilities?

41 7. With respect to the Section 17200 claim, Gallagher’s arguments appear to focus
 42 on monetary damages. If, however, if the Fund’s focus is on specific practices
 43 that allegedly lead to underreserving (for example, Gallagher’s use of the MIRA
 44 program) and if it is those practices that the Fund seeks to enjoin through the
 45 Section 17200 action, why would that not create a genuine issue of material fact
 46 as to whether the Fund has standing to enjoin those practices? That is, if the
 47 Court cannot say as a matter of law that Gallagher’s practices are negligent, how

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1 can the Court say as a matter of law that the Fund has not been injured (and will
 2 not be injured in the future) as a result of those practices?

3 8. Evidence submitted by Gallagher suggests that in the last twenty years, only
 4 sixty self-insurer's have become insolvent and defaulted on their obligations.
 5 (See Kennedy Reply Decl., Ex. J at 2.) Why does that evidence not undercut the
 6 Fund's arguments on the credible threat of harm and the imminency of such
 7 harm?

8 9. Gallagher submits an excerpt of a presentation that includes a statement by the
 9 Fund's counsel that, with respect to TPAs, the Fund would seek to made whole
 10 *to extent of under-reserving.* (See Lynch Decl., Ex. D.) Why does that statement
 11 not support Gallagher's argument on damages?

12 10. In opposition to Gallagher's motion, the Fund argues that the total amount of the
 13 underreserving might equal what it has paid out on claims. (Fund Opp. at 17-
 14 18.) Although the amount of the underreserving may cover all of the Fund's
 15 alleged losses, the issue before the Court is whether, as a matter of law, the Fund
 16 is entitled to particular types of damages.

17 a. What is the Fund's best argument that the plain language of Labor Code
 18 § 3744 does not limit its claim for damages to the amount that Gallagher
 19 underreserved claims?

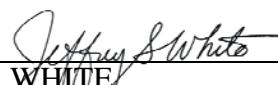
20 b. Labor Code § 3744(c) permits the Fund to bring this action "to recover
 21 compensation paid and liability assumed by the fund...." Why would that
 22 language not encompass the damages the Fund seeks?

23 c. How does Gallagher respond to the Fund's assertion that the definition of
 24 "incurred liabilities for the payment of compensation" would encompass
 25 the costs of administrating claims and legal costs incurred in connection
 26 with administrating claims?

27 d. The Fund asserts that the security deposit is intended to cover claims that
 28 have not yet been filed and that it is entitled to damages from Gallagher
 for such claims. (Fund Opp. at 18.) Yet the Fund also argues that the
 "total accrued liability" is calculated in part by the sum of each individual
 claim. (See Question 3.) If that is the case, how can Gallagher be liable
 for underestimating claims that had not yet been filed?

11. Are there any other issues the parties wish to address?

Dated: August 20, 2007



JEFFREY S. WHITE
 UNITED STATES DISTRICT JUDGE